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September 13, 2000

BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54

Dear Ms. Salas:

Enclosed for filing in the above-referenced docket are the original and eleven copies of the "Petition for Reconsideration" of the Fourth Report and Order in the referenced docket, FCC 00-253, released July 24, 2000, filed by the Association of Communications Enterprises ("ASCENT").

Please contact the undersigned if you have any questions.

Respectfully submitted,

Linda L. Oliver
Counsel for the Association of
Communications Enterprises

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Interconnection and Resale Obligations	)	CC Docket No. 94-54
Pertaining to	)	
Commercial Mobile Radio Service	)	

PETITION FOR RECONSIDERATION

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Dated: September 13, 2000

SUMMARY

In its July 24, 2000, *Fourth Report and Order,* the Commission determined that resellers of commercial mobile radio services (CMRS) do not have a right to interconnect directly with the networks of facilities-based CMRS providers. The Association of Communications Enterprises (ASCENT) seeks reconsideration of this determination on the ground that the Commission has effectively determined that no possible request by a wireless reseller for interconnection of its switch with a CMRS provider's network could ever be considered to be in the public interest, no matter what the particular facts associated with an individual request.

The Commission's across-the-board ruling is inconsistent with the intent and purpose of Sections 201 and 332 of the Communications Act of 1934. Those sections require the Commission to consider, after hearing, whether a particular request for physical interconnection is in the public interest. Whatever the Commission's authority to adopt a general rule that interconnection is not always required, the Commission lacks authority to refuse to consider whether a particular request for interconnection is in the public interest.

The Commission's restrictive reading of statutory provisions was compounded by the disregard of principles and decisions relying on *Hush-A-Phone v. United States,* 238 F.2d 26 (D. C. Cir. 1956). Contrary to the *Fourth Report and Order's* conclusion, that case – and the long line of judicial and FCC decisions applying it – requires the Commission to focus on the benefits and costs of the

interconnection request rather than on the dominant status of the carrier receiving the interconnection request.

The Commission's narrow interpretation of applicable law and precedent also not only unfairly deprives wireless resellers of the opportunity to present requests for interconnection in the future; that narrow interpretation could also limit the Commission's authority to order interconnection with respect to other telecommunications services, thus threatening the ability of the Commission to facilitate the development of a "network of networks."

For the above reasons, even assuming the Commission upholds its ruling that there should be no general requirement for mandatory interconnection of a reseller's switch with a CMRS provider's network, the Commission should establish on reconsideration that it will consider specific requests for interconnection on the facts presented, as required by Sections 201(a) and 332 of the Act.

TABLE OF CONTENTS

Page

I. THE COMMISSION'S ABSOLUTE DECISION NEVER TO CONSIDER CMRS RESELLER INTERCONNECTION REQUESTS WILL HAVE UNFORESEEN CONSEQUENCES FOR COMPETITIVE NETWORKS.....3

II. SECTION 201(A) DOES NOT PERMIT THE COMMISSION TO ESTABLISH A BLANKET RULE EXEMPTING CMRS PROVIDERS FROM ALL REQUESTS FOR INTERCONNECTION.....5

III. THE COMMISSION INCORRECTLY INTERPRETED ITS PRECEDENT UNDER SECTION 201. 11

IV. CONCLUSION 14

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In the Matter of	)	
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To: The Commission

PETITION FOR RECONSIDERATION

The Association of Communications Enterprises ("ASCENT")1/, acting pursuant to Sections 1.106 and 1.429 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.429, hereby respectfully petitions the Commission for reconsideration of the *Fourth Report and Order* issued in the captioned proceeding on July 24, 2000.2/

ASCENT seeks reconsideration of the Commission's decision to deny the right of a wireless resale-based carrier under any and all circumstances to obtain physical interconnection between its switch and a facilities-based commercial

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1/ The Telecommunications Resellers Association (TRA) was renamed ASCENT on May 10, 2000. The National Wireless Resellers Association (NWRA), which in 1997 merged with TRA, participated actively in this rulemaking, filing comments and reply comments in response to the initial Notice of Proposed Rulemaking and seeking mandamus to obtain Commission action.

2/ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Fourth Report and Order*, CC Docket No. 94-54, FCC 00-253, released July 24, 2000, 65 Fed. Reg. 49530 (August 14, 2000)(summary) ("*Fourth Report and Order*" or "*Order*").

mobile radio service (CMRS) provider's network. 3/ In the *Fourth Report and Order*, the Commission concluded that Section 201 of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 201, permits the Commission to determine, once and for all, that no set of circumstances could warrant an order under Section 201 requiring a facilities-based CMRS provider to interconnect directly with a switch-based wireless reseller. That kind of blanket prohibition cannot be squared with the Commission's obligation to engage in reasoned decision-making and to account for future changes in circumstances which might warrant a different result.

At a minimum, the Commission should grant reconsideration to make it clear that even if a general rule mandating such interconnection is not warranted, the Commission will continue to consider under Section 201(a) whether the particular facts presented by a specific request for interconnection with a CMRS provider's facilities justify a finding that such interconnection is in the public interest.

3/ ASCENT, formerly the Telecommunications Resellers Association, is the international trade association representing the interests of advanced communications companies. ASCENT members provide voice and data services, including Internet access, high-speed transport, local and long distance phone service, application services and wireless products. ASCENT has more than 725 company and individual members, most of which are small to medium-sized businesses. As such, ASCENT strives to assure that all service providers, particularly entrepreneurial firms, have the opportunity to compete in the communications arena and have access to critical business resources.

I. THE COMMISSION'S ABSOLUTE DECISION NEVER TO CONSIDER CMRS RESELLER INTERCONNECTION REQUESTS WILL HAVE UNFORESEEN CONSEQUENCES FOR COMPETITIVE NETWORKS.

Many of ASCENT's members are engaged in the resale of wireless services. As the Commission previously has recognized, such resale is important as a competitive spur to the offerings of facilities-based wireless providers. 4/ Wireless resale is also critical to the ability of all carriers to compete in a full-service world in which carriers offer combinations of long distance, local, data, Internet, and wireless services. Few if any service providers will own the network facilities necessary to provide all of these services. Unrestricted resale is therefore the key to vigorous competition and consumer choice in the provision of full-service offerings. Many carriers today provide service over a combination of owned and resold facilities. New entry and innovation in fact depend on the ability of carriers to employ other carrier's networks to provide their services.

Increasingly, interconnection among carrier networks will be essential to enabling such entry and innovation to take place. Forever forcing competitive carriers to use the incumbent local exchange carrier network as a means to interconnect with other networks will perpetuate inefficiencies and stymie

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4/ *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *First Report and Order*, 11 FCC Rcd 18455, 18462, ¶ 10 (1996), *aff'd, Cellnet Communications Inc. v. FCC*, 149 F.3d 429 (6th Cir. 1998) (reciting long list of public interest benefits flowing from unrestricted wireless resale); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Second Report, FCC 97-75, released March 25, 1997), 12 FCC Rcd 11266, 11287 (1997) (recognizing contribution of resellers to promotion of competition and consumer choice in CMRS market).

innovative uses of telecommunications technology, such as multifunction switches. The Commission itself has recognized that the ILEC's role as the intermediary between carriers cannot persist forever. In its July 1999 "Competitive Networks" Notice of Proposed Rulemaking, the Commission observed as follows:

> As the market matures and the carriers providing services in competition with the incumbent LECs' local exchange offerings grow, we believe these carriers may establish direct routing arrangements with one another, forming a network of networks around the current system. In time, it is likely that the incumbent LECs will cease to be viewed as the presumptive primary providers of interconnection, and indeed they will begin to seek interconnection and other arrangements with their challengers. 5/

In stark contrast to this view of the future, the Commission's *Fourth Report and Order*, issued one year later, effectively freezes in place the role of the incumbent LEC as the means for interconnection with wireless providers' networks. The *Fourth Report and Order* reflects an inflexible approach to requests for interconnection under Section 201 and may thereby frustrate, if not preclude, the Commission's ability to make a "network of networks" a practical reality.

In view of the foregoing, ASCENT is gravely concerned about the impact of the Commission's *Fourth Report and Order* in this case, and not just because of its impact on wireless resellers. The decision establishes a narrow standard for interconnection under Section 201(a), which, if allowed to stand, could

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5/ *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141, released July 7, 1999, ¶ 22, 14 FCC Rcd 12673, 12685 (1999) ("*Competitive Networks NPRM*").

pose obstacles for other types of carriers seeking to interconnect in the future outside of the context of this particular decision. The "network of networks" the Commission envisions cannot come to fruition if interconnection obligations only apply to dominant carriers, as the Commission states in the *Fourth Report and Order*. 6/

The Commission should take this opportunity to modify its *Order* in this proceeding and confirm the correct meaning of Section 201. From that perspective alone, the Commission should reconsider the impact of its approach in the *Fourth Report and Order* in order to preserve its ability to consider and grant in the future requests for interconnection that are necessary or desirable to further the goal of a "network of networks."

II. SECTION 201(A) DOES NOT PERMIT THE COMMISSION TO ESTABLISH A BLANKET RULE EXEMPTING CMRS PROVIDERS FROM ALL REQUESTS FOR INTERCONNECTION.

Whatever the Commission's authority under Section 201(a) to make a general decision, in a rulemaking context, that physical interconnection among carriers is not warranted, the Commission is not authorized under Section 201(a) to decide, in advance, that no set of facts could ever justify an order for physical interconnection with a CMRS provider.

Section 332(c)(1)(B) of the Communications Act, which specifically applies to CMRS providers, states as follows:

6/ *Fourth Report and Order* at ¶ 12.

> Upon *reasonable request* of any person providing commercial mobile service, the Commission shall order a common carrier *to establish physical connections* with such service pursuant to section 201 of this Act. 7/

CMRS resellers are providers of commercial mobile service, just as much as facilities-based CMRS providers. Thus, through Section 332(c)(1)(B), Congress expressly made the Act's Section 201 interconnection provisions applicable to CMRS providers. Section 201 in turn provides as follows:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, *after opportunity for hearing*, finds such action necessary or desirable in the public interest, *to establish physical connections with other carriers* 8/

In the *Fourth Report and Order*, the Commission concluded, after conducting a "hearing" in the form of a rulemaking, that the public interest did not justify adoption of a rule requiring facilities-based CMRS providers to interconnect directly with the switch of another carrier (a reseller of CMRS service). Section 201 simply does not permit the Commission to reach such a far-reaching conclusion. Nor does the record support the broad-based conclusion that no circumstance could arise in the future to justify the grant of a request for interconnection with a CMRS provider's switch.

7/ 47 U.S.C. § 332(c)(1)(B) (emphasis added).

8/ 47 U.S.C. § 201(a) (emphasis added).

The impact of the *Fourth Report and Order's* refusal to consider the individual factual circumstances of any interconnection request was made clear in the Wireless Telecommunications Bureau's subsequent rejection of two pending complaints by wireless resellers requesting interconnection of their switches with CMRS providers' networks pursuant to Sections 201 and 332(c)(1)(B) of the Act. 9/ In denying those complaints, the Bureau simply cited the Commission's *Order* in this rulemaking proceeding, without analyzing the facts presented by those complaints. 10/ In the order denying the complaints, the Bureau characterized the *Fourth Report and Order* as follows:

> The Commission has recently held (1) that Sections 201 and 332 do not require mandatory interconnection between CMRS networks and resellers' switches and (2) that resale switch interconnection is not required by the public interest. 11/

This sentence constituted the sum total of the Commission's discussion of the issue under Section 201 and 332.

In the *Fourth Report and Order*, the Commission thus clearly intended to foreclose any request for interconnection by a wireless switch-based reseller with the network of a facilities-based CMRS provider. This it cannot lawfully do under Section 201, which specifically provides for a "hearing" and a "public interest"

9/ *Cellnet Communications, Inc. v. New Par, Inc. d/b/a Cellular One and Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc.*, File Nos. WB/ENF-F-95-010, WB/ENF-F-95-011, DA 00-1600, released July 26, 2000.

10/ *Id.* at ¶ 8.

11/ *Id.* at ¶ 8.

determination before a request for physical interconnection can be denied. Whatever the justification for rejecting requests for an across-the-board interconnection requirement, there is no possible justification for a decision to rule out any such individual requests in the future, regardless of their factual basis and the public interest balance in each case.

The impact of the *Fourth Report and Order's* blanket rule extends far beyond the particulars of a wireless reseller's interconnection request. First, there is the possibility that facilities-based competitive local exchange carriers might seek to interconnect their switches with the mobile switch. The Commission's ruling could be read automatically to foreclose the requests of such carriers to employ existing switches, which they have already deployed to interconnect with wireline networks, with wireless carriers' switches. The public interest benefits of such interconnection cannot be weighed if the Commission has already foreclosed consideration of those benefits. Second, the *Fourth Report and Order* does not take into account changes in technology that might minimize the costs of interconnection for CMRS providers, that might eliminate technical issues, or might otherwise affect the costs of providing interconnection in a particular case. Third, the Commission did not consider the possibility that technical and service innovations could be made that would boost the public interest benefits of interconnection. The Commission, in short, has no crystal ball, and cannot avoid the balancing it must do under Section 201 in the future.

Section 251(a) of the 1996 Telecommunications Act provides no support for the Commission's view that direct, physical interconnection with a CMRS provider's facilities is never warranted. 12/ As the Commission noted in the *Fourth Report and Order*, Section 251(a), as interpreted by the Commission in its 1996 *Local Competition Order*, requires telecommunications carriers to interconnect with each other either directly or indirectly (through the incumbent LEC). 13/ Section 251(a) and Section 201(a) have two entirely different meanings and purposes. Section 201(a)'s interconnection provisions predate the adoption of Section 251(a) in 1996. Nothing in the 1996 Act was meant to disturb the requirements of Section 201(a) or the Commission's prior interpretations of that Section, as Congress expressly provided: "Nothing in this section [Section 251] shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i). This savings clause makes it clear that Section 251(a)'s provision for "direct or indirect interconnection" does not affect the Commission's obligation to consider, after opportunity for hearing, whether direct ("physical") interconnection is warranted under particular circumstances pursuant to Section 201(a).

The fact that Congress left Section 201(a) intact means that the Commission has an obligation to consider requests for such physical

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12/ 47 U.S.C. §251(a). *See Fourth Report and Order* at ¶ 13.

13/ *Fourth Report and Order* at ¶ 13, citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, 15989-91 (1996) (subsequent history omitted).

interconnection, rather than determining, as it did in the *Fourth Report and Order*, that indirect interconnection is always adequate. Such a determination effectively writes the interconnection provisions of Section 201(a) out of the Act for CMRS providers.

The Commission's refusal to consider interconnection requests based on their individual public interest merits also is akin to a decision to refuse to consider requests for waiver of a Commission rule. Such a result would fly in the face of the Commission's long-standing obligations. The courts have made it clear that the Commission must consider requests for waiver of Commission rules, and the Commission's own procedural rules make provision for granting waiver requests if there is "good cause" to do so.14 As the United States Court of Appeals for the District of Columbia Circuit observed on another occasion, "[A]n agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Similarly, the Commission must state, on reconsideration, that, despite its refusal to mandate interconnection by CMRS providers with reseller switches across-the-board, it will consider individual requests for interconnection under Section 201 and will evaluate those requests on their own public interest merits.

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14 See, e.g. *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); 47 C.F.R. § 1.3.

III. THE COMMISSION INCORRECTLY INTERPRETED ITS PRECEDENT UNDER SECTION 201.

In the *Fourth Report and Order*, the Commission adopted a narrow interpretation of *Hush-a-Phone v. United States* and its progeny, an interpretation that, left standing, could impede the Commission's ability to promote a "network of networks" and to facilitate entry and innovation in all telecommunications markets. 15/ *Hush-A-Phone* and the cases that have applied it over the years have had a tremendous pro-competitive impact. They were in part responsible for opening the customer premises equipment (CPE) and long distance markets to competition.

In the *Fourth Report and Order*, the Commission nonetheless rejected the arguments of wireless resellers that the proper test for evaluating requests for interconnection under Section 201 was the one established in the D.C. Circuit's 1956 decision in *Hush-A-Phone Corp. v. United States.* 16 In that case, the court had required AT&T to allow a customer to apply a device to his telephone because the device would be "privately beneficial without being publicly detrimental." 238 F.2d at 269. Although the Commission and the courts have repeatedly applied that same standard in numerous interconnection matters, the Commission held in the *Fourth Report and Order* that it did "not read *Hush-A-Phone* as establishing a

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15/ *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956).

16 *Fourth Report and Order* at ¶ 9.

standard for interconnection that [it] must apply here [to interconnection for wireless resellers]." 17/

The Commission's effort to limit *Hush-A-Phone* and the long line of cases applying that decision cannot be squared with any reasonable assessment of those cases. It is true, as the *Order* points out, that many of those cases involved interconnection with a dominant carrier. It is equally true that some of those cases relied on earlier decisions requiring AT&T "to honor reasonable requests for interconnection. . ." *Order* at ¶ 11. But nowhere can it be said that those decisions were premised *solely* on AT&T's dominant position. *Hush-A-Phone* itself, for example, was premised on the transparent unreasonableness of AT&T's tariff provision (and the concomitant Commission decision approving it) that permitted a subscriber to obtain privacy in a telephone conversation "by cupping his hand between the transmitter and his mouth and speaking in a low voice" but not in applying a device that would accomplish the same result without any harm to the telephone network. 238 F.2d at 269.

In each of the succeeding decisions applying *Hush-A-Phone*, including those cited by the Commission in the *Fourth Report and Order*, both the Commission and the courts uniformly focused on the benefit secured by the subscriber and the harm that would (or would not) ensue for the telephone company—not on the question of whether the underlying carrier was or was not dominant. *E.g. Fort Mill Telephone Company v FCC*, 719 F.2d 89, 92 (4th Cir. 1983)

17/ *Fourth Report and Order* at ¶ 9.

("[s]ince the *Hush-A-Phone* case was decided in the late 1950's, it has been the law that a telephone subscriber has a federal right to use his telephone equipment in ways that are 'privately beneficial without being publicly detrimental'"); *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1330 (D.C. Cir. 1989) ("the FCC has adopted our formulation of the customer's right reasonably to use his telephone equipment as a federal right against intruding state regulation whenever the customer uses his equipment in ways that are privately beneficial without being publicly detrimental"); *American Telephone and Telegraph Company*, 71 FCC 2d 1, 10 (1979) (telephone customer cannot be "prevented from connecting his private communications system with the local exchange service needed for effective access"), *quoting AT&T Premises Ruling*, 60 FCC 2d 939, 943 (1976). Stated another way, the *Hush-A-Phone* standard flows from a common carrier's obligation to serve the public indifferently and not from its status as a dominant carrier.

The Commission's reliance in the *Fourth Report and Order* on the 1998 resale decision of the United States Court of Appeals for the Sixth Circuit is understandable but misplaced. *Order* at ¶ 10, *citing Cellnet Communications, Inc. v. FCC*, 149 F.3d 429 (6th Cir. 1998). *Cellnet* did adopt a narrow reading of *Hush-A-Phone* in applying that case to the question of resale. According to the Sixth Circuit, the District of Columbia Circuit did nothing more in *Hush-A-Phone* than hold that the applicable AT&T tariff provision constituted "an unwarranted interference with a person's use of their telephone." 149 F.3d at 437. On that basis, *Cellnet* observed that *Hush-A-Phone* did not "recognize the existence of a customer's

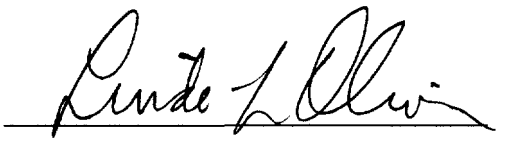
right to resell services as long as such was not publicly detrimental." In other words, *Cellnet* appeared to say that, despite the plain language of the case and the subsequent application of the *Hush-A-Phone* test in other, much broader contexts, a telephone common carrier had carte blanche authority to restrict a customer's use of its own equipment (except in the peculiar facts of *Hush-A-Phone*). *Cellnet* thus is inconsistent with the language of *Hush-A-Phone* itself as well as the various judicial and Commission decisions interpreting and applying *Hush-A-Phone*. The Commission should therefore clarify that *Hush-A-Phone* remains the applicable test for requests for interconnection under Section 201. In that way, the Commission can preserve its ability to use its Section 201 powers to order physical interconnection among carriers where the public interest requires it.

CONCLUSION

For the reasons given, the Commission should reconsider its decision in the *Fourth Report and Order* in this proceeding, as follows: Assuming the Commission upholds its ruling that there should be no general requirement for mandatory interconnection of a reseller's switch with a CMRS provider's network, the Commission should nevertheless establish on reconsideration that it will consider specific requests for interconnection on the facts presented, as required by Section 201(a) of the Act. Such action will make the Commission's *Order* consistent

with precedent and will preserve the Commission's power to consider and grant future requests for interconnection on the basis of the facts, whether in the wireless context or otherwise.

Respectfully submitted,



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Attorneys for the Association of Communications Enterprises

Dated: September 13, 2000

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that on this 13th day of September, 2000, copies of the foregoing "Petition for Reconsideration" of the Association of Communications Enterprises were served by hand delivery to the following:

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